Coil-ACC, Inc. *and* International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 20. Cases 8-CA-13062 and 8-CA-13289

June 9, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On November 10, 1981, Administrative Law Judge James M. Fitzpatrick issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, a brief in answer to the Charging Party's exceptions, and a motion to reopen the record. The Charging Party filed exceptions and a supporting brief, a brief in answer to Respondent's exceptions, and an opposition to Respondent's motion.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order,[3] as modified herein.[4]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Coil-ACC, Inc., Toledo, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order, as so modified:

1. Substitute the following for paragraph 1(d):

"(d) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act."

2. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:

"(b) Expunge any reference to the discharge of Rick Cornelison from his personnel record or other files."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT coercively interrogate employees about their union activities.

WE WILL NOT threaten to close the shop if the Union represents our employees.

WE WILL NOT discharge or otherwise discriminate against employees for engaging in union activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

WE WILL offer Rick Cornelison immediate and full reinstatement to his former position or, if that position no longer exists, to a sub-

---

[1] The Administrative Law Judge did not make clear that, when Respondent's owner, Joseph Oliver, discharged Orlie Stahl as a driver, he offered Stahl employment as a laborer at lower pay. Both Oliver and Stahl testified without contradiction that the offer was made and refused. In addition Stahl testified that he had the laborer's job "For a week while I looked for another job."

Member Jenkins regards Respondent's reasons for discharging Cornelison as having been discredited as pretextual, thus leaving no lawful reason for the discharge and making *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), inapplicable.

[2] Respondent moved to reopen the record to present evidence of substantial changes in its employee complement which would render the bargaining order inappropriate. Respondent's motion is denied as none of the issues it raises are relevant to determining whether a bargaining order should now issue. *Tartan Marine Company*, 247 NLRB 646, 648, fn. 8 (1980).

[3] In accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

[4] Based on our own careful analysis of this case, we have determined that Respondent, by the number and extent of its unfair labor practices, and their pervasiveness in this unit of only four employees, has engaged in such egregious and widespread misconduct as to demonstrate a general disregard for its employees' fundamental statutory rights. We therefore find appropriate modification of the recommended Order to include broad injunctive language against the further commission of any unfair labor practices by Respondent. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

We shall also modify the Administrative Law Judge's recommended Order by requiring Respondent to expunge from Rick Cornelison's personnel record, or other files, any reference to his discharge.

stantially equivalent position without prejudice to his seniority or other rights and privileges previously enjoyed, and WE WILL make him whole for any loss of earnings or benefits suffered by reason of the discrimination against him, with interest.

WE WILL expunge any reference to the discharge of Rick Cornelison from his personnel record or other files.

WE WILL, upon request, bargain collectively in good faith with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 20, as the exclusive representative of our employees in the appropriate unit described below and embody any understanding reached in a signed agreement. The appropriate bargaining unit is:

All full-time and regular part-time machine operators and truckdrivers, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the National Labor Relations Act, employed at our Toledo, Ohio shop.

COIL-ACC, INC.

DECISION

STATEMENT OF THE CASE

JAMES M. FITZPATRICK, Administrative Law Judge: In this case the company president refused to recognize the Union which all four of his employees had joined. Shortly thereafter he fired one employee and 2 months later fired another. The issues are (a) whether he unlawfully questioned employees about going to the Union and told them he would close the shop to avoid the Union, (b) whether he unlawfully refused to recognize and bargain with the Union, (c) whether the two discharges were unlawful discrimination, and (d) whether a fair election can now be held. As set out below, I find the questions to employees, the threat to close and the refusal to recognize and bargain were all unlawful. I also find that the first discharge was unlawful discrimination but that the second was not. Finally, I find that the circumstances are such that a fair election cannot be held.

The case arises out of two unfair labor practice charges filed by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 20 (the Union), against Coil-ACC, Inc. (the Company or Respondent), claiming Respondent had committed unfair labor practices prohibited by the National Labor Relations Act, as amended (the Act). The first charges (Case 8-CA-13062) were filed August 3, 1979,[1] and September 6 a complaint based on these charges issued alleging that Respondent had engaged in unfair labor practices prohibited by Section 8(a)(1), (3), and (5) of the Act. On September 19 Respondent answered, denying the unfair labor practices. On October 23 the Union filed additional charges (Case 8-CA-13289) which it amended on November 29. On December 11 an amended consolidated complaint based on all these charges issued, and was further amended at the hearing, alleging that Respondent had engaged in unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act. Respondent answered this complaint on December 18, admitting jurisdictional allegations, the identity of the parties and of Respondent's principal officer, and the appropriateness of the bargaining unit alleged, but denying all alleged unfair labor practices. The issues remaining are whether Respondent violated Section 8(a)(1) of the Act by interrogating employees about union activities and by threatening that the plant would close. The discrimination issues are whether Respondent terminated Rick Cornelison on June 22 and thereafter refused to reinstate him because he engaged in union activities in violation of Section 8(a)(3) of the Act and whether on August 23 Respondent similarly violated Section 8(a)(3) by terminating Orlie Stahl and thereafter refusing to reinstate him. With respect to union representation, the complaint alleges that since June 19 the Union has been the exclusive representative of a majority of Respondent's employees in an appropriate bargaining unit and that since June 20 it has requested, and Respondent has refused, to bargain with it thereby violating Section 8(a)(5) of the Act. Respondent denies all these allegations. The complaint also alleges, and Respondent denies, that the unfair labor practices of Respondent dissipated the Union's majority status and created an atmosphere in which a free and fair election under Board auspices cannot now be held. These issues were heard before me at Toledo, Ohio, on March 31 and April 1, 1980.

Based on the entire record,[2] including my observation of the witnesses and consideration of the briefs of the parties, I make the following:

FINDINGS OF FACT

I. THE EMPLOYER AND THE UNION

Respondent, an Ohio corporation, has since June 1978 been engaged at Toledo, Ohio, in the manufacture and wholesale distribution of rain gutters and downspouts. In this business it annually ships to points outside Ohio goods valued over $50,000, and I find it is an employer engaged in commerce within the meaning of the Act. Joseph Oliver is Respondent's owner, president, and chief operating officer, and is an agent acting on its behalf. The only other management official is Respondent's accountant. During the period pertinent to this case Respondent employed four employees, including one tractor-trailer driver and three shop workers, one of whom also operated a truck.

It is undisputed that the Union is a labor organization within the meaning of the Act.

[1] All dates herein are in 1979 unless otherwise indicated.

[2] I include as part of the record a copy of a letter dated May 15, 1980, from Respondent's attorney to the counsel for the General Counsel respecting reinstatement and backpay for Rick Cornelison. I have marked it ALJ Exh. 1.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. *Union Organizing*

About June 12 Respondent discharged part-time employee Charles Collins. This prompted the other employees to discuss among themselves the benefits of organizing a union for their mutual aid and protection. About June 17 Rick Cornelison, a general laborer in Respondent's shop, contacted his brother-in-law, Harold Wick, a business agent for the Union, and arranged a meeting of employees at the union hall after work on June 19. All the employees, which then included Rick Cornelison and his brother John, both general laborers, Ron Lowe, a general laborer and truckdriver, and Orlie Stahl, the tractor-trailer driver, attended. Wick discussed with them the process of organizing a union and obtained from all four signed cards authorizing the Union to represent them. At that point the Union represented all of Respondent's employees.

B. *The Union's Request for Recognition*

Prior to setting up Respondent Company in June 1978, Oliver has been vice president of Alumco Industries which was engaged in the rain gutter and downspout business. On June 20, the day after Respondent's employees met in the union hall, Oliver received a telephone call from a supervisor at Alumco who told him he was in for a surprise, that the Union was calling on him. That afternoon Wick and a fellow union business agent, Gerald Anderson, called on Oliver. They requested that he recognize and bargain with the Union as the representative of his employees and presented him with a letter to the effect that the Union represented a majority of them. They offered to submit their authorization cards to an impartial person for examination and count. Oliver refused the request by telling them to first see Alumco and then he would talk with them. The union agents then left.

That same day the Union petitioned the Board for an election.[3] In a telephone conversation the following day the parties agreed to schedule the election for July 26. However, prior thereto unfair labor practice charges in Case 8-CA-12968 were filed by the Union against Respondent effectively blocking further processing of the representation case.[4]

The parties agree, and I find, that the following employees of Respondent constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time machine operators and truckdrivers, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

Ordinarily a question of whether the Union represents the employees in that unit would be determined by a Board election. But, as found hereinafter, Respondent here has engaged in unfair labor practices which impede that election process. Accordingly, since 100 percent of the employees had executed valid cards authorizing the Union to represent them at the time the Union requested recognition on June 20, I find Respondent had a duty to recognize and bargain with the Union as of that time and its failure to do so violated Section 8(a)(5) of the Act. *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575, 614 (1969).

C. *The Poll*

After Wick and Anderson left him on June 20, Oliver went out into the shop and polled three of his four employees. He first went to Rick Cornelison and, according to Rick, whom I credit, said, "Rick, what in the hell are you trying to pull going down to the Teamsters hall and organizing a union, and with two men, are your kidding, I'll close up first." Both Rick and Oliver agree that he also asked Rick why he wanted a union. They also agree that Rick did not respond to Oliver's questions.

After talking with Rick, Oliver went to his brother John Cornelison and asked, "Johnnie, did you go to the union?" John admitted he had. Oliver then asked the following, "Why, Johnnie, you and I work together every day, if you had a problem, why didn't you come to me?" John indicated he wanted security. Oliver said, "What kind of security, Johnnie, with your poor attendance record, I haven't done anything to you."

Oliver then went to Stahl and asked, "Orlie, did you go to the union?" Stahl admitted he had. Oliver then asked, "What for, Ollie?" Stahl replied, "I want a pension and a raise." Oliver replied, "My god, Orlie, I can't give you a raise, you have caused over $6,000 in damage." Oliver testified that in effect he asked Stahl, "Did you vote for the union," and that he so described his language in a pretrial affidavit. Stahl placed their conversation on June 21 but I credit Oliver that it occurred on June 20 because it was a logical continuation of the poll he had begun with the Cornelison brothers. I find that Stahl was mistaken about the date. Respecting the conversation, however, he testified without contradiction that Oliver "told me that he couldn't afford to deal with the union and that they weren't worth a s— and all they wanted was my money." I find that Oliver made this statement and that it was an indication of his animosity toward the Union.

Oliver did not question his fourth employee, Ron Lowe, because on June 20 Lowe was out of the plant making deliveries. The following day, June 21, however, Lowe came up to Oliver in the shop and mentioned the Union, saying he was no longer interested in it. Oliver walked away, saying he did not want to hear about it.

A day or two later, according to Stahl, whom I credit, Oliver again approached him in the plant and, referring to the Union, told Stahl he would close down the plant, put it into his wife's name, and start over somewhere else if he had to. He also offered to let Stahl invest $10,000 in the Company, an offer which Stahl refused. Again in late July, according to Stahl, whom I credit, Oliver again approached him at a time when Stahl was wearing a union

[3] The representation proceeding is identified as Case 8-RC-11843.

[4] These blocking charges were later withdrawn when the charges on which the present complaint is based were filed.

button[6] and again said something about closing the plant in Toledo and moving his operations to his warehouse facility in Chicago. He asked Stahl to move with him to Chicago, saying he had too much time and money invested in Stahl. Although Stahl inquired whether the prospective move was because of the Union, Oliver did not reply. Stahl refused his offer to move to Chicago.

The General Counsel, citing *Sullivan Electric Company*, 199 NLRB 809, 810 (1972), and *Nation-Wide Plastics Co., Inc.*, 197 NLRB 996 (1972), contends that Respondent violated Section 8(a)(5) of the Act by refusing to deal with the Union after Oliver had conducted a poll of employees which demonstrated that a majority supported the Union. But, as pointed out by Respondent, the poll did not demonstrate majority support for the Union. It demonstrated only that 50 percent of the employees had sought out the Union. Lowe was never polled and on June 21 indicated he was not interested in the Union. Although Oliver did poll Rick Cornelison, the evidence fails to show that Rick responded. In fact the evidence indicates he did not respond. Accordingly, this allegation fails for lack of proof.

The poll as conducted by Oliver, however, did run afoul of Section 8(a)(1) of the Act because it was not conducted with the accompanying safeguards which the Board requires, and absent these safeguards Oliver's questions were coercive interrogations impinging on the employees' Section 7 rights. *Struksnes Construction Co., Inc.*, 165 NLRB 1062, 1063 (1967). Oliver's conversations with Rick Cornelison on June 20 and with Stahl later also violated Section 8(a)(1) because they blatantly threatened that he would close the shop and start over somewhere else in order to escape the Union.

D. *The Termination of Rick Cornelison*

The complaint alleges that on June 22 Respondent laid off or terminated Rick Cornelison, and since has failed to reinstate him, for the reason that he had joined, supported, assisted, or favored the Union or that Respondent believed he did. Respondent denied this and sought to show that he was terminated for various other reasons. Thus, in connection with investigation of union charges against Respondent in Case 8-CA-12968, Oliver on July 10 wrote to the Board's Regional Office indicating that Rick Cornelison was laid off (a) because of a poor attendance record, (b) because, contrary to Oliver's expectations when he hired him, he proved unable to stage common carrier orders, ship United Parcel orders, drive a forklift truck or properly load trucks, and (c) because Oliver received many complaints regarding elbows he had fabricated. On September 14, in connection with the Board's investigation of the charges on which the present complaint is based, Oliver again wrote the Board's Regional Office summarizing the above reasons for Rick Cornelison's termination and adding the reason that Darryl Carr, a working supervisor at Alumco whom Oliver had long sought to hire, became available and Oliver terminated Rick Cornelison because he preferred to have Carr as an employee. At the hearing herein Oliver added still another point by testifying that on June 22 he told Rick Cornelison that that was his last day and he was laying him off because of lack of work. In sum, Respondent asserts that Rick Cornelison was terminated for valid business considerations rather than for reasons proscribed by the Act. This is, therefore, a dual motive termination which is appropriately evaluated pursuant to the standards set for in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

Under the first *Wright Line* test, I find that the General Counsel has made a *prima facie* case that Rick Cornelison was discharged on June 22 for discriminatory reasons. It is undisputed that Oliver knew that union business agent Wick was his brother-in-law. It is also undisputed that the so-called layoff of Rick Cornelison occurred within 2 days of the Union's request for recognition and bargaining based on its claim that it represented a majority of Respondent's employees and Oliver's interrogation of three employees, including Rick Cornelison, and his threats of plant closure, thereby demonstrating his animus toward the Union and his belief that all those interrogated had gone to the Union. It is also undisputed that Oliver spent considerable time in the shop among his small complement of employees. In these circumstances I find that Oliver knew of Rick Cornelison's involvement with the Union and most certainly believed that he was a union supporter. *Circle K Corporation*, 173 NLRB 713, 715 (1968). In addition the timing of the discharge together with its unexplained suddeness without notice warrant the inference that Oliver was aware of the undisputed fact that Rick was a key figure in contacting the Union. *Richard L. Cannady and Jane Cannady d/b/a Bob White Target Company*, 189 NLRB 913, 921 (1971); *M. J. Pirolli & Sons*, 194 NLRB 241, 245 (1971). Respondent's normal workweek is from Monday morning until Saturday noon. Rick Cornelison was terminated suddenly and without notice on Friday afternoon before the end of the workweek. There being no explanation for the abruptness of the discharge within the workweek, an inference of discriminatory motive is warranted. *Circle K Corp., supra.*

The evidence demonstrates that the reason given Rick for his layoff, namely, lack of work, was a false reason. A plentiful supply of raw material was on hand and Respondent's normal operations call for continuous processing of this material to provide an adequate inventory for filling of incoming orders. There is no evidence that inventories were excessive. The day before Oliver had told the shop crew that they were overstaying their breaks and that he needed more elbows. He would not likely have so stated if in fact he was running out of work for the employees. The day after Rick was terminated he was replaced by a newly hired casual employee, Rex Dalton, who continued working for 2 weeks. At the end of Dalton's 2 weeks, another new employee, Randy Duvall was hired to replace him. Both Dalton and Duvall performed the elbow work which Rick Cornelison had previously done. At the time of the hearing Respondent had made no move to recall Rick. In fact, he was not recalled until May 15, 1980. Although Rick was told he was laid off, he was actually terminated. Oliver

[6] Even after Oliver refused to deal with the Union, Stahl continued wearing his union button about half the time while he was working.

testified that he does not discharge employees but only lays them off so they may claim unemployment compensation without problems. The lack of work reason offered by Oliver to Rick is further put in question by Respondent's failure to rely on this point during the investigative stages of this proceeding or during the hearing. The General Counsel offered the testimony of Rick Cornelison himself, which testimony I credit, that at the time he was terminated Oliver said to him, "You are laid off effective immediately." Rick then asked, "Why," and Oliver explained, "We have no coil and I think you really know why." Further corroboration of Oliver's motive is found in his statement to Stahl on June 20 that he could not afford to deal with the Union.

The General Counsel having made out a *prima facie* case of discriminatory motive in the discharge of Rick Cornelison, the question arises under *Wright Line, Inc., supra*, whether Respondent would have discharged him when it did in the absence of union activity. Oliver testified that he hired him on May 15 because he understood he had experience which qualified him not only to operate the machines in the shop but also to operate the forklift and to handle the loading and unloading of trucks and carriers. According to Oliver he was disappointed in him. He testified Rick could not operate the forklift, although Rick testified without contradiction that his operation of the forklift was never criticized. Oliver also testified that Rick had too many problems was never criticized. Oliver also testified that Rick had too many problems staging loads for common carriers, that he did not know the paperwork required, and did not know the product sufficiently well. As a result, according to Oliver, he put Rick to work on the elbow machines where his efforts were the most helpful, and in the meantime Oliver searched for someone to replace him. It is true that Rick spent about 80 percent of working time on the elbow machines. But he also loaded and unloaded trucks, if not common carriers, and was engaged in such loading at the time Oliver discharged him.

From the time Oliver left Alumco and established Respondent's business, he had been interested in employing Darryl Carr as a working supervisor to assist him by both supervising and working in the shop. Carr had had extensive experience at Alumco in shopwork and supervision. Just after Oliver left Alumco he offered Carr a job but Carr did not accept then. In February and again in March 1979 Oliver repeated his offer of employment without success. Then in the first part of June, Carr decided he would leave Alumco and contacted Oliver and they met on June 16 at which time Oliver made him a specific offer. According to Carr, whom I credit, he rejected the offer at that time because he wanted to think about it further. Then on Tuesday, June 19, he gave Aumco 1 week's notice and at 6 o'clock in the evening telephoned Oliver that he was ready to move. Although Oliver wanted him to report the next day, Carr demurred and they agreed he would start work with Respondent on Monday, June 25.

In the meantime, he filed an employment application with Respondent on Friday, June 22, the same day Oliver discharged Rick Cornelison. Oliver testified that on the evening of Tuesday, June 19, he knew he had to eliminate one employee because he could only afford a four-man crew, and of the four he considered Rick Cornelison the most expendable. There is no evidence that at that point Oliver knew of any union activity. He testified that he needed Stahl, the only employee licensed to operate tractor-trailers. He considered John Cornelison the best all-around general laborer in the operation of machinery in the shop. His testimony indicates that he considered Ron Lowe more valuable than Rick Cornelison because Lowe had acquired a license to operate a truck for short hauls. The thrust of his testimony seems to be that Carr was intended to replace Rick Cornelison. But that is not what happened. The evidence indicates that Carr operated the elbow machine at most 5 hours per week while Rick had spent 80 percent of his time in that work.

As already noted, there was in fact no shortage of work in the shop. On Saturday, June 23, the day after Oliver discharged Rick, his brother John Cornelison did not show up for work. Oliver did not recall Rick but instead called in Stahl's brother to substitute for that day in filling a rush order. On Monday, June 25, although Carr reported for work, John Cornelison did not. This left only Stahl and Lowe on duty as rank-and-file employees. Yet Oliver did not recall Rick. Instead, he hired John Spaulding who had no experience whatever in Respondent's line of work. Later he hired Randy Duvall instead of recalling Rick. Oliver justified this on the ground that Duvall was better qualified than Rick. But, even if this were so, Oliver continued to hire additional help on a temporary basis without recalling Rick. In addition to part-time help in midsummer Oliver recalled John Cornelison in addition to having employed as temporaries his brother Perry and employee Charles Collins.

In support of his position Oliver testified that it was Respondent's practice to give new employees a raise after 30 days and that Rick was not given such a raise, because, according to Oliver, he had a poor attendance record and because of his work habits, which Oliver did not specify. The fact that Oliver did not give him a raise after 30 days I deem to be immaterial because Oliver admittedly hired him at more than the beginning rate at the time he started. Further, Oliver admitted that other employees had attendance records equally as poor as Rick Cornelison. And in any case Rick's attendance record does not in fact appear to be that bad. Although he was tardy on five occasions during the period of employment, Oliver admitted that he worked considerable overtime and also that the shop did not have a uniform starting time. Without condoning tardiness, it is obvious that tardiness was not normally deemed a significant fault in Respondent's shop.

Oliver also gave as a reason for discharging Rick the fact that he had received complaints from customers about defective elbows. Although he had never criticized Rick for any of his work, and in fact had complimented him, telling him to keep up the good work, he gave him the defective elbows to rework. But whether in fact the defective elbows were Rick's fault is unclear because others were also fabricating elbows and, as Oliver admitted, it was impossible to tell who made a bad elbow.

In the past Respondent has laid off a full-time employee on only one occasion, following Christmas 1978 because of a lack of work. As Oliver testified, his season ran down. The busy season is in the summer and, as shown by Respondent's continued hiring of new people after Rick's discharge, lack of work was not a valid reason for discharging him.

The above evidence is not sufficient to establish that Respondent would have discharged Rick Cornelison even in the absence of union activity. The coincidence in timing between the Union's demands for recognition and Rick's discharge is very suspicious, as is the unexplained suddenness of the discharge without notice. Another suspicious circumstance is the fictitious reason Oliver gave to him for the discharge; namely, lack of work. I also find significant the failure of Oliver to recall Rick, an experienced employee, rather than hiring a parade of new employees.

It is also significant that Oliver shifted his grounds for discharge from the one which he gave Rick Cornelison at the time of discharge to the reasons which he first offered to the Regional Office and then later reoffered, but with additions as noted above. In these circumstances those justifications are not persuasive. Accordingly, I find that a preponderance of the credible evidence fails to establish that Rick Cornelison would have been discharge in the absence of union activity. Thus, the General Counsel's *prima facie* case being unrebutted, I find that Respondent's discharge of Rick Cornelison on June 22 and its failure thereafter to reinstate him violated Section 8(a)(3) of the Act.

E. *The Termination of Orlie Stahl*

Respondent hired Orlie Stahl in February as a tractor-trailer driver. The complaint alleges, and the answer denies, that on August 23 Respondent terminated him because of his union activity. In spite of its answer Respondent's post-hearing brief admits that Stahl was effectively terminated on August 23. He was relieved of his duties as a driver and offered temporary work as a general laborer for a week at a lower rate of pay while he looked around for other employment, an offer which he refused. Respondent justifies the termination on the ground that Stahl was responsible for a series of mishaps which justified discharge. The issue, therefore, is whether his termination was discriminatory or for valid business reasons, an issue appropriately tested under the standards of *Wright Line, Inc., supra.*

As already noted, Stahl was among employees who on June 19 met at the union hall and executed union authorization cards. Wick at that time also distributed union buttons to the employees. Thereafter Stahl wore his union button and, even after Respondent's refusal to recognize the Union and the discharge of Rick Cornelison, continued to wear it about half of the time, thereby displaying his continued support of the Union. Oliver knew on June 20 that Stahl had gone to the Union and I infer, based on Stahl's display thereafter of his union button, that Oliver knew he continued to be a union supporter. Some of the same general reasons which support the finding of a *prima facie* discriminatory discharge of Rick Cornelison support a similar finding of discriminatory discharge in the case of Stahl. In Stahl's case the coincidence of timing between the Union's request for recognition and discharge are not as dramatic but nevertheless are persuasive in view of Stahl's continuing union activity in the face of Oliver's animosity demonstrated by his unlawful interrogations and threats of plant closure. Oliver testified that he began looking for a replacement for Stahl in June because of an accident in which he was involved on June 1 and that he held up discharging him because of "the union problem." He first learned of the union problem on June 20 when he received the call from Alumco. After June 20 the Union continued to be a factor for Oliver to consider. On June 26 the Union filed its petition seeking an election (Case 8-RC-11843) and on July 6 it filed the 8(a)(1), (3), and (5) charges in Case 8-RC-12968 which were withdrawn when the instant charges were filed August 3. Thus, Stahl's continued and overt involvement with the Union in the circumstances above described warrants the inference that it played a part in Oliver's reasons for discharging him on August 23. Accordingly, under the first standard of *Wright Line, Inc., supra*, I find that the General Counsel has made a *prima facie* case of discriminatory discharge.

Respondent contends that Stahl was terminated because he had been responsible for too many accidents. Respondent's tractor-trailer equipment which Stahl operated consisted of a tractor leased from Avis Leasing Corporation and a trailer leased from Convoy Trailers Systems, Inc. Stahl's first accident occurred in March when he drove his rig under a viaduct too low to clear the trailer and tore the top off the trailer requiring repairs costing $2,769. The incident provided clear grounds for discharge because Stahl was plainly at fault and the damages were substantial. But Oliver did not fire him. He testified that he needed a tractor-trailer driver and Stahl was then still a new employee.

Stahl's second accident, which was of a minor nature, occurred in late spring when he was making a delivery to Clay Spouting, a customer of Respondent. In backing his rig into the customer's dock, Stahl struck the gutter of the building thereby damaging it. The customer told him not to worry about it because they were in the gutter business and would replace it themselves. Stahl informed Oliver about the accident but the customer has never submitted a bill for the damage. The General Counsel seems to take the position that the incident should be ignored because it was minor and Respondent is not out of pocket for the damage done. However, it cannot be viewed as minor for business purposes because the incident involved damage to a customer's property and, although Oliver did not take action against Stahl at that time, he would have been justified in doing so.

The third accident occurred June 1 when Stahl failed to observe a tree limb overhanging a street and the upper right corner of his trailer caught the limb thereby damaging the trailer. At the hearing herein the General Counsel sought to demonstrate that the accident was unavoidable because the center line on the street had been moved to Stahl's right because of construction on the left. But there is no evidence that Stahl's vision of the tree was obscured nor any evidence as to why, in town

traffic, he was unable to simply stop to avoid the collision. On the evidence in this record he again plainly was at fault. The town police at the site of the accident, who did not issue him a citation, estimated the damage to the trailer at $150. Stahl reported the accident to Oliver who instructed him to continue using the trailer and it was not returned to Convoy for repairs until sometime later. By that time air pressure had inflicted additional damage by tearing the metal covering on the trailer more than had been initially caused by the accident. The repairs by Convoy amounted to $2,320. In addition, while the trailer was down for repairs, Respondent had to continue paying for its rental and also pay rental for a replacement trailer which amounted to $845. The total cost to Respondent was $3,165. The General Counsel argues that Stahl was not responsible for this extensive damage and in fact was only responsible for a minor portion of it, $150 as estimated by the police. But there is no indication that the police examination was anything but perfunctory. And while it is clear that continued use of the trailer caused further tearing in the surface of the trailer, even Stahl's testimony does not indicate that the additional tearing was the major portion of the damage. Further, Convoy's repair of the equipment revealed structural damage in that the right front post of the trailer was fractured. Thus, and without finding precisely what portion of the damage was due to the accident as distinguished from that due to Oliver's failure to immediately have it repaired, it is clear that the equipment was substantially damaged as the result of Stahl's faulty operation of his vehicle. Again, Oliver did not discharge Stahl at the time of the accident. And even at the time of discharge, he did not assess all of the cost against Stahl because he then only had an estimate that the damages would amount to about $2,000 and apparently overlooked the cost involved in the rental of the replacement trailer.

Although Stahl was the only employee licensed to operate a tractor-trailer, Ron Lowe had gotten a license qualifying him to operate an ordinary truck. For local deliveries and short hauls Respondent leased from Avis a new Mercedes truck. The testimony of Oliver indicates that Respondent took possession of the vehicle in early July and that Lowe normally operated it. On August 7 Stahl at Oliver's direction used the Mercedes to make a delivery. After he had gone 7 or 8 miles the truck broke down and was towed away by Avis for repairs. Examination during repairs revealed that the center hub was torn from the clutch disc which, in the opinion of the Mercedes representative, resulted from the driver downshifting from too high a speed. Avis refused to honor the warranty on the vehicle and charged Respondent $262 for repairs. The General Counsel urges that Respondent has not shown that Stahl was responsible for the breakdown because he had only driven it a few miles and most of the time it had been operated by Lowe who did not have a good driving record. For the purposes of resolving the issue at hand, however, it is unnecessary to go beyond the fact that the breakdown occurred while Stahl was driving and that the professional opinion of those involved in repairing the vehicle was that it resulted from unnecessary downshifting. In these circumstances it was not unreasonable for Oliver to hold Stahl responsible for the damage to the vehicle.

The final incidents involved another customer of Respondent called Custom Gutter. In late July or early August, as Stahl was backing the tractor-trailer to unload an order at the dock of Custom Gutter, the trailer nudged the customer's building. Although Stahl testified he had no knowledge of any damage, the customer complained to Oliver and Oliver inspected the building since only Respondent's tractor-trailer delivered to that dock. He concluded that the damage was not "that bad." But then on August 23 as Stahl was making another delivery to Custom Gutter, he again nudged the building with his trailer. Oliver did not inspect the building on this occasion. In discharging Stahl he assessed liability against him for the first incident in the amount of $650 and indicated that the damage in the second incident was unknown. I agree with his initial estimate that the damage was not that bad and I find that both incidents were minor. Nevertheless, from a business point of view they had serious implications because they involved property of a customer who, whether for good or bad reason or no reason at all, was in a position to take his business elsewhere. The General Counsel endeavored to show that the damage to the Custom Gutter building could have been caused by drivers delivering to a neighboring dock who found it convenient to back their rigs into the approach to Custom Gutter's dock in order to turn around. I discount the argument and the evidence on this point because the record also shows that the distance into Custom Gutter's dock is approximately 60 feet and it seems unlikely that drivers delivering to other business would back in that far and thereby collide with Custom Gutter's building if in fact they were not making a delivery there.

The General Counsel endeavors to diminish the impact of Respondent's evidence by pointing out that Stahl had never been warned or disciplined for his accidents. There is, however, no evidence that any other employee received warnings or reprimands and from the record as a whole I infer that Oliver did not follow a standard practice of warning or of disciplining employees. In fact the Company's entire employment policy appears to be somewhat informal, if not capricious, from the employees' point of view.

By an invoice dated August 20, Avis billed Respondent for $262 for the repaired Mercedes clutch. The record does not show exactly when this bill was received but, allowing a reasonable time for the mails, I find that Oliver received it on or about August 22. By this time both Avis and Convoy had indicated verbally to Oliver that he should get a new driver. He testified that on that day he decided to terminate Stahl because of the clutch incident and prepared a discharge letter to that effect. However, Stahl was not in the shop that day and Oliver was unable to deliver it to him.

The General Counsel contends that Respondent has treated Stahl disparately because its other driver, Ron Lowe, also experienced a number of difficulties but was only suspended for 3 days instead of discharged. Many of the Lowe incidents, including this one, occurred after Stahl's discharge. On July 6, prior to Stahl's discharge,

Lowe had backed his truck into a car, for which he received a citation for not exercising good judgment. A few days later on July 11 he received a citation for speeding. On August 9 he was involved in an accident resulting in $901 damage. On November 3, subsequent to Stahl's discharge, Lowe was injured when a 400-pound coil dropped on his hand. There is no evidence in the record of responsibility for the incident. On February 2, 1980, he received a citation for speeding. Finally, on March 25, 1980, Oliver suspended him for 3 days because he failed to complete a run. Only the last of these incidents arguably involved a customer of Respondent, and that is not specifically established. The damage caused in the August 9 accident was not insignificant but, on the other hand, was not nearly as substantial as the total accumulated damage attributable to Stahl in the operation of his tractor-trailer. Considering that Oliver operates a small enterprise without well-established procedures, I find that the differences, if any, between the way he treated Stahl and the way he treated Lowe are not sufficient to support an inference of discrimination in Stahl's case. I find instead that, as early as June, when Oliver hoped to hire a better driver from Alumo, one James Goode, Oliver had been thinking of replacing Stahl because of the problems already accumulated. Oliver's receipt of the Avis bill of August 20 for the repair of the Mercedes clutch precipitated his final decision to terminate Stahl. That was a valid business reason. Except for Stahl's continued display of his union button, no other union activity engaged in by him personally around that time suggests that Oliver acted for reasons of discrimination rather than for valid business reasons. I find that Respondent has satisfied the second *Wright Line* test by demonstrating that it would have discharged Stahl even if he had not engaged in union activities. Accordingly, I find that a preponderance of the evidence fails to establish that Stahl was discharged and thereafter not reinstated because he engaged in union or other activity protected under the Act.

F. *The Gissel Question*

The General Counsel urges that the Union is entitled to an order requiring the Company to bargain with it as the majority representative of its employees under the doctrine of *N.L.R.B.* v. *Gissel Packing Co., supra.* I agree.

Where, as here, the employer has engaged in unfair labor practices, the question arises as to whether they tend to undermine the Union's majority strength and impede the election process. Here, Respondent has not only engaged in coercive conduct toward all its employees by interrogating three-fourths of them immediately after the Union requested recognition and by threatening half of them with plant closure, but also by discharging one of them 2 days later because of his union involvement and thereafter assiduously avoiding his recall. The Board has long held that discrimination against employees because of union activities is a serious unfair labor practice which "goes to the very heart of the Act" (*A. J. Krajewski Manufacturing Co., Inc.*, 180 NLRB 1071 (1970)) and is the "surest method of undermining a union's majority or impeding an election process" (*N.L.R.B.* v. *Sitton Tank Co.*, 467 F.2d 1371, 1372 (8th Cir. 1972)). The lingering effects of unlawful conduct may not be cured by traditional Board remedies with the result that the chance of a fair Board election is slight. I find that the nature of the unfair labor practices in this case have that effect. In these circumstances the Union's majority status as indicated by the authorization cards executed by all of the employees in the bargaining unit at the time of the request for recognition is reliably established and provides an adequate basis for a bargaining Order. *N.L.R.B.* v. *Gissel Packing Co., supra,* 395 U.S. at 614; *Richard Tischler, etc. d/b/a Devon Gables Nursing Home, etc.*, 237 NLRB 775 (1978).

III. THE EFFECTS OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The unfair labor practices of Respondent set forth in section II, above, occurring in connection with the operations described in section I, above, have a close and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent threatened, coerced, and restrained its employees in the exercise of the rights guaranteed in Section 7 of the Act by the following conduct:

(a) Interrogating its employees as to whether they had gone to the Union.

(b) Threatening its employees that the shop would be closed if the Union represented them.

4. By discharging employee Rick Cornelison on June 22, 1979, and thereafter failing to reinstate him, Respondent discouraged membership in the Union and discriminated against him because he engaged in union activities, thereby committing unfair labor practices prohibited by Section 8(a)(3) of the Act.

5. By terminating Orlie Stahl on August 23, 1979, and thereafter not reinstating him Respondent did not commit unfair labor practices prohibited by the Act.

6. All full-time and regular part-time machine operators and truckdrivers, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, employed by Respondent at its Toledo, Ohio, shop constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

7. Since June 19, 1979, the Union has been, and is now, the exclusive representative of all employees in the above described unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment by virtue of Section 9(a) of the Act.

8. Respondent, by failing and refusing to recognize and bargain with the Union as the exclusive bargaining representative of the employees in the above-described unit

since the Union requested such recognition and bargaining on June 20, 1979, committed unfair labor practices within the meaning of Section 8(a)(5) of the Act.

9. The unfair labor practices found above affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent violated Section 8(a)(1), (3), and (5) of the Act, I recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Even though Respondent's unfair labor practices are of a nature which tend to taint the laboratory conditions necessary and desirable for a Board election, I do not recommend what is commonly referred to as a broad order because Respondent is not shown to have a proclivity for violating the Act nor has it engaged in egregious or widespread misconduct demonstrating a general disregard of employee statutory rights. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

Because of the discrimination against him as found hereinabove Rick Cornelison is entitled to be made whole. Even though Respondent by its attorney's letter of May 15, 1980, appears to have offered to make Rick Cornelison whole for that discrimination, the fulfillment thereof is appropriately a matter for compliance and, pending compliance, it is appropriate that the usual remedial order be entered. Accordingly, I recommend that Respondent be ordered to offer Rick Cornelison immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other benefits and privileges, and that he be made whole for any loss of earnings incurred as a result of being discharged on June 22, 1979, with backpay to be computed as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and with interest as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977). I further recommend that Respondent be required to preserve and make available to Board agents, upon request, all pertinent records and data necessary in analyzing and determining whatever backpay may be due.

Inasmuch as Respondent's violations of Section 8(a)(1) and (3) of the Act tend to undermine the Union's majority thereby impeding the electoral process, with the result that an election under Board auspicies would likely be a less reliable guide to employee free choice than the authorization cards by which they designated the Union to represent them, and because Respondent, in refusing to recognize and bargain with the Union while engaging in those unfair practices, violated Section 8(a)(5) and (1) of the Act, I recommended that Respondent be required to recognize and bargain with the Union as well as to remedy the unfair labor practices found. *N.L.R.B.* v. *Gissel Packing Co., supra; Federal Prescription Service, Inc.*, 203 NLRB 975 (1973), enfd. as modified 496 F.2d 813, 819 (8th Cir. 1974).

I further recommend that Respondent post the appropriate notices.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[6]

The Respondent, Coil, ACC, Inc., Toledo, Ohio, its officers, agents, successors, assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees respecting their union activities.

(b) Threatening to close the shop if the Union represents the employees.

(c) Discharging or otherwise discriminating against employees because they engaged in union activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist a labor organization, to bargain collectively through representatives of of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any or all such activities.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer to Rick Cornelison immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings or benefits he may have suffered by reason of Respondent's discrimination against him as set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Recognize and, upon request, bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 20, as the exclusive bargaining representative since June 20, 1979, of all employees in the appropriate bargaining unit described below, and, if an understanding is reached, embody such in a signed agreement. The appropriate unit is:

> All full-time and regular part-time machine operators and truck drivers, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the National Labor Rela-

[6] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein, shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

tions Act, employed at Respondent's Toledo, Ohio shop.

(d) Post at Respondent's shop in Toledo, Ohio, copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 8, after being duly signed by Respondent's authorized representative, shall be posted by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 8, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that insofar as the complaint alleges unfair labor practices not specifically found in this Decision, such allegations are hereby dismissed.

[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."